including 'commission of a fraud or criminal offense' and were not presently indicted for such offenses."[705] The CAFC could not determine the relationship between La Mastra and his two companies during the receivership.[706] Without explanation, the contracting officer signed a responsibility determination, noting that JVC had "a satisfactory record of performance, integrity, and business ethics."[707]

Garufi's protest in the COFC alleged that the contracting officer made an "arbitrary and capricious responsibility determination."[708] The COFC, finding no allegations of fraud or bad faith by the contracting officer, limited its review to the documentary record before the contracting officer. On this evidence, the COFC "held that the responsibility determination was not arbitrary or capricious."[709]

The CAFC explicitly rejected the government's argument that "'absent allegations of fraud or bad faith' by the contracting officer, the responsibility determination . . . is immune from judicial review,"[710] thereby distinguishing the federal standard of review from the GAO's standard. The court then announced that "the traditional APA standard adopted by the *Scanwell*[711] line of cases allows for review of an agency's responsibility determination if there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."[712]

Using the rational basis standard, the CAFC determined that it did "not know whether the contracting officer's determination was valid . . . because the contracting officer's reasoning supporting that determination is not apparent from the record,"[713] and ordered the contracting officer deposed to determine the basis for the his responsibility determination. Specifically, to decide whether a rational basis for the responsibility determination existed, the CAFC needed to know: "(1) whether the contracting officer, as required by 48 C.F.R. § 9.105-1(a), possessed or obtained information sufficient to decide the integrity and business ethics issue, including the issue of control, before making a determination of responsibility; and (2) on what basis he made the responsibility determination."[714]

The *Impresa* decision will likely result in greater scrutiny of affirmative responsibility challenges in federal court. Further, since the *Impresa* standard differs from the GAO standard, protestors may engage in "forum shopping . . . seeking the best possible treatment."[715]

CONTRACT PERFORMANCE

Contract Interpretation

Omitted Specifications Read into Contract

Demonstrating how truly burdensome the government contracting process can be, a recent COFC decision has held that a construction contractor is required to comply with architectural details that were included in contract drawings but not in the specifications. In *Centex Construction Co. v. United States*,[716] the contractor sought an adjustment for having to install channel bracing around metal door openings. Two of the contract drawings indicated the need to install this channel bracing, but the specifications made no mention of any bracing.[717] The government's argument against giving the contractor an adjustment was simple: the contract, like most construction contracts, contained a FAR clause[718] that indicated "[a]nything mentioned in the specifications and not shown on the drawings, or shown on

705. *Id.* at 1329.

706. *Id.* at 1337 ("[N]either the Court nor the parties had sufficient knowledge of Italian law to understand all aspects of how the preventive sequestration affected the companies involved.").

707. *Id.* at 1329.

708. *Id.*

709. *Id.* at 1330.

710. *Id.* at 1333.

711. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

712. *Impresa*, 238 F.3d at 1330, 1333. For further discussion regarding jurisdiction under the *Scanwell* standard, see *supra* notes 624-29 and accompanying text.

713. *Id.* at 1337.

714. *Id.* at 1339.

715. Feldman, *supra* note 698, at 8.

716. 49 Fed. Cl. 790 (2001).

717. *Id.* at 791-92.

718. FAR, *supra* note 11, § 52.236-21 (Specifications and Drawings for Construction).

the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."[719]

The contractor contended, however, that "notwithstanding this standard clause, it is unreasonable to hold it to every minute detail in the voluminous drawings attached to the contract," especially because this type of detail normally would have been found in the specifications.[720] Therefore, its omission from the specifications "would lead a reasonable contractor to conclude that channel bracing was not required."[721] The court rejected this contention, noting its approval of a 1967 Court of Claims case that rejected the "notion that the scope of the specifications and drawings is limited by some overarching concept of commercial reasonableness."[722] This holding is of some significance to construction contractors because construction contracts often contain large numbers of drawings and lengthy specifications.

Meaningless Interpretation

This past year, the CAFC decided *Program & Construction Management Group, Inc. v. United States*,[723] a case in which it held that deletion of the one and only provision in a solicitation that expressly required a cafeteria to remain open during construction did not imply the cafeteria could be closed.[724]

In 1994, the GSA issued a solicitation to upgrade the heating, ventilation, and air conditioning system at a Department of Energy building in Germantown, Maryland. The solicitation repeatedly stated that the building had to remain open during the upgrade. It also stated that work in the cafeteria could not occur on weekdays between 5:00 a.m. and 2:00 p.m. There was only one place in which it mentioned, however, that the cafeteria within the building had to remain open. This reference was contained in a note to an architectural drawing, which also discussed the need to keep the inside temperature between a certain range during construction.[725]

During a preproposal conference, Program & Construction Management Group, Inc. (PCMG), told the government that keeping the building within the set temperature range during construction would be a significant cost that would depend upon the time of year construction was to take place. It asked for further details on the timeline for when the GSA would issue a notice to proceed. Because the government had not worked out its timelines yet, it ultimately decided to delete the temperature range requirement from the contract. PCMG asserted that, during this preproposal conference, it had also inquired whether the cafeteria could be closed.[726] For some reason, rather than amending the aforementioned note to remove the requirement to keep the temperature within a set range, the government deleted the entire note.[727]

PCMG claimed that, because specific language took precedence over general language, the deletion of the only specific requirement to keep the cafeteria open should be interpreted to mean that the cafeteria would be closed despite the remaining language requiring that work not occur during certain weekday hours.[728] The CAFC instead focused on the fact that the weekday workhour proscription would be meaningless under such an interpretation since such a proscription would only be needed if the cafeteria were to remain open during construction.[729]

Creating an Ambiguity Using Extrinsic Evidence

In a second CAFC decision addressing contract interpretation principles, *Jowett, Inc. v. United States*,[730] the court held

719. 49 Fed. Cl. at 791.

720. *Id.* at 793.

721. *Id.*

722. *Id.* (citing Unicon Mgmt. Corp. v. United States, 375 F.2d 804, 805 (Ct. Cl. 1967)).

723. 246 F.3d 1363 (Fed. Cir. 2001), *aff'g* Program & Constr. Mgmt. Group, Inc. v. Gen. Servs. Admin., GSBCA Nos. 14178, 14757, 00-1 BCA ¶ 30,641.

724. *Id.* at 1364.

725. *Id*. at 1364-65.

726. *Id.* at 1365-66. Neither the court nor the board stated whether PCMG had met its burden of proof on this issue or whether it would have any bearing on interpreting the intrinsic evidence.

727. *Id.*

728. Program & Constr. Mgmt. Group, Inc. v. Gen. Servs. Admin., GSBCA Nos. 14178, 14757, 00-1 BCA ¶ 30,641 at 151,302. The CAFC did not specifically address this issue.

729. *Program & Constr. Mgmt. Group, Inc*., 246 F.3d at 1366.

730. 234 F.3d 1365 (Fed. Cir. 2000).

that a contractor may not use extrinsic evidence to create an ambiguity if there is no ambiguity upon reviewing all the intrinsic evidence.[731] In 1996, the Corps of Engineers (COE) awarded Jowett, Inc. (Jowett), a contract to construct a three-story office building. The contract required Jowett to construct suspended ceilings between the floors through which it would run duct work and wiring. It also required Jowett to install insulation around the cold air supply ducts, return air ducts, and plenums; an exception to that requirement indicated that insulation should be omitted from return air ducts and plenums in the suspended ceiling. During construction, Jowett contended it was not required to insulate the cold air supply ducts located in the ceiling. After the contracting officer directed Jowett to install insulation around all supply ducts, it submitted a claim for an additional $84,000.[732]

Before the CAFC, Jowett argued that "even if there is no ambiguity in the contract's language on its face, [the court] should resort to trade practice to interpret its terms."[733] Because standard industry practice was to not insulate supply ducts located in ceiling spaces, Jowett felt the contract should be interpreted to be missing any requirement to provide such insulation. The CAFC rejected this argument, distinguishing Jowett's circumstances from those found in *Metric Constructors, Inc. v. National Aeronautics and Space Administration*.[734] The CAFC noted that in *Metric* the contract contained a term that had an accepted industry meaning that differed from its ordinary meaning and that the court permitted extrinsic evidence to demonstrate this inconsistency within the intrinsic evidence. The CAFC determined that Jowett could not resort to extrinsic evidence in this case because even after considering such evidence, Jowett still could not demonstrate that the contract was ambiguous on its face.[735]

Changes

Army Spends an Extra $19.5 Million to Prevent Expiration of Funds

The ASBCA ruled that the Army knew its technical data package (TDP) for the Chaparral missile guidance section was defective, yet failed to disclose this superior knowledge to a second-source developer.[736] Ford Aerospace Corp. (Ford) was the initial producer of the guidance sections. In 1988, the Army awarded a contract to Hughes Missile Systems Company (HMSC) to act as a second source for the guidance sections.[737] The second-source request for proposals stated that the "guidance section is a build-to-print item."[738] Before the board, both parties indicated the term "build-to-print" meant that the guidance section would work if the contractor built it in accordance with the TDP.[739]

Despite this government representation that the contract was for a "build-to-print" component, there were several indicators that the TDP was deficient. First, an internal government memorandum dated one week before issuance of the RFP indicated that the TDP was "not fully mature."[740] Given these reservations, the government attempted to have an independent contractor validate the TDP. The independent contractor report stated that it could not validate the TDP because portions of the guidance section "will require redesign . . . to correct deficiency."[741] In addition, a Ford vice president sent a letter to the Army, dated fifteen days before award was made to HMSC, remarking that over 200 engineering change requests had not yet been incorporated into the TDP and that a number of these "represent significant design changes."[742]

731. *Id.* at 1368.

732. *Id.* at 1366-67.

733. *Id.* at 1368.

734. 169 F.3d 747 (Fed. Cir. 1999).

735. *Jowett, Inc.*, 234 F.3d at 1368-70.

736. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245.

737. *Id.* at 154,199.

738. *Id.*

739. *Id*.

740. *Id*.

741. *Id.* at 154,200. Coincidentally, Raytheon Co., which subsequently acquired HMSC ten years later, was the firm hired to perform this independent validation. *Id*.

742. *Id*.

Following award to HMSC, 379 changes were incorporated into the contract to correct TDP deficiencies. On 17 January 1995, the government terminated the contract for convenience. At termination, the contract price was $60.4 million and HMSC's total costs were $83 million. The estimated cost to complete the contract was $95.2 million.[743] The contractor submitted a $27 million claim based upon both impossibility of performance and superior knowledge.[744] The contracting officer allowed just over $12 million for "discrete events" caused by the TDP deficiencies that increased HMSC's costs.[745]

Because the board held in favor of Raytheon Company on the superior knowledge claim and awarded it an additional $7.4 million, the overall adjustment caused by the TDP deficiencies amounted to nearly $19.5 million.[746] The board's opinion definitely implies that the government knew it was buying into a future claim when it awarded the contract. The board also implied that the only rationale for proceeding in this manner was to use funds before they expired.[747]

COFC Fells Forest Service

The COFC held that the Forest Service (FS) breached its implied duty to cooperate on fourteen timber sale contracts by representing that it had identified all measures necessary to protect endangered species when it had not in fact done so.[748] The court also held that the FS breached its implied duty not to hinder eleven of the same fourteen timber contracts by suspending them for an unreasonable period of time.[749] At issue were claims amounting to over $13 million.[750]

The timber contracts each gave the FS the right to interrupt or delay operations to "comply with a court order."[751] They also included a FS clause, entitled "Protection of Endangered Species," which allowed the FS to modify or cancel the timber contracts to provide additional protection for endangered or threatened species.[752] This latter clause specifically stated that "[m]easures needed to protect such areas have been included elsewhere in the contract or are as follows" without any mention of measures taken to protect FS lands inhabited by the Mexican spotted owl.[753] When the Fish and Wildlife Service (FWS) listed the Mexican spotted owl as an endangered species in April 1993, the Endangered Species Act (ESA) required the FS to consult with the FWS before making any "irreversible or irretrievable commitment of resources in order to insure the protection of endangered and threatened species."[754] Region 3 of the FS (Region 3) believed that the ESA only applied to future actions and that any decisions to sell timber in already existing Land and Resource Management Plans (LRMP) did not require consultation with the FWS. It therefore elected not to consult with the FWS on LRMPs covering the contracts at issue.[755]

Unfortunately for the FS, a federal district court had ruled on 25 October 1993 that the FS had to consult with the FWS on "LRMPs that existed prior to the listing of a species under the ESA."[756] After this decision, Region 3 still did not consult with

743. *Id*. at 154,201.

744. *Id.* at 154,201-02. The board rejected the impossibility argument on the basis that roughly half of the guidance sections had already been built by the contractor and accepted by the government. *Id.* at 154,204. The contractor also contended there had been a mutual mistake by the parties, but the board rejected this argument because the government "knew the true condition of the TDP and misrepresented it as one for a build-to-print item." *Id.* at 154,205.

745. *Id.* at 154,202. The board did not clearly define how the "discrete events" basis of liability differs from the superior knowledge basis.

746. *Id.* at 154,205.

747. *Id.* at 154,200. The decision does not discuss whether this was an incrementally funded contract, so it is unclear exactly how much of the contract was funded with these about-to-expire funds, and whether, in hindsight, the elected course of action was economically prudent.

748. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001). These were contracts in which the government sold the right to harvest trees from FS lands to private firms. *Id*. at 37.

749. *Id.* at 70-72.

750. *Id.* at 51. There was at least thirty-eight other timber sale contracts that were suspended in similar circumstances. *Id.* at 47. The COFC decided only liability, not quantum. *See id*. at 73-74.

751. *Id.* at 40.

752. *Id.*

753. *Id.*

754. *Id.* at 41.

755. *Id.* at 42-43.

756. *Id.* at 43 (citing Pacific Rivers Council v. Robertson, 854 F. Supp. 713, 723 (D. Or. 1993)).

the FWS, believing that the district court's ruling should be appealed to the Court of Appeals for the Ninth Circuit.[757] Meanwhile, several environmental groups filed suit in an Arizona district court seeking an injunction against timber harvesting in Region 3 because the FS had not consulted with the FWS.[758] The district court granted this injunction on 24 August 1995, and the FS suspended all timber sale contracts in the region the following day.[759] About 2.5 months later, the FS began formal consultation with the FWS. Several months later, the FWS issued a draft Biological Opinion (BO) that was later determined to be legally insufficient. Finally, on 4 December 1996, a final BO was issued allowing commencement of logging activities in Region 3 once again.[760]

The COFC held that the Protection of Endangered Species clause created an express warranty that the FS "had disclosed all protective measures required to comply with the ESA that it knew were necessary or should have known were necessary."[761] The court accepted the FS's position that it had a "genuine legal argument" not to to consult on its existing LRMPs when the Mexican spotted owl was listed as an endangered species. The court also held, however, that the FS should have known that consultation was necessary by the time the Ninth Circuit made its ruling. The court concluded that the FS's breach of this express warranty amounted to a breach of an implied duty to cooperate.[762] It also held that the FS's delay in commencing formal consultation with the FWS after the Ninth Circuit's decision as well as its part in developing a legally deficient BO, which both stalled resumption of logging, were unreasonable and amounted to a breach of its implied duty not to hinder contractual performance.[763]

Old, but Not Forgotten

On contracts that are awarded after 1 October 1995, the Contract Disputes Act requires claims to be submitted "within 6 years after the accrual of the claim."[764] On pre-1995 contracts, the claim merely had to be submitted within a reasonable time, which typically meant it could not be delayed so long as to prejudice the government in some manner. This past year, in *LaForge and Budd Construction Co. v. United States*,[765] the COFC held that the government failed to demonstrate it was prejudiced by a contractor's claim submission seven years after accrual. In *LaForge*, the contractor was a small business that entered into a contract with the COE to build a munitions storage facility at Tinker Air Force Base in Oklahoma.

The contractor submitted undisputed evidence that the COE's Area Engineer did not get along with the contractor and had instructed his inspectors to "tighten down on those bastards and run them off Tinker Air Force Base within thirty days."[766] Subsequent government practices resulted in the contractor alleging government interference and delays. Unfortunately, the contractor did not submit a claim until seven years after completion of its efforts.[767]

At trial, the government argued that the claim should be barred by *laches* because it was prejudiced by the delayed filing. The COFC disagreed, noting that the government was not entitled to a presumption of prejudice and it had failed to present adequate evidence of actual prejudice. The government had alleged it lost track of two government employees who had first-hand knowledge of the events and that it had lost daily inspection reports dealing with the events. The court, however, felt this was insufficient to demonstrate prejudice because the government could not explain what information these reports and witnesses would provide.[768]

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757. *Id.* at 43. The Ninth Circuit ultimately affirmed the lower court's holding on 7 July 1994. *Id.* at 44 (citing Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994)). Again, the FS attempted to avoid having to consult on existing LRMPs. It unsuccessfully petitioned for a writ of certiorari to the Supreme Court in February 1995. *Id.* at 46 (citing Thomas v. Pacific Rivers Council, 514 U.S. 1082 (1995)).

758. *Id.* at 45.

759. *Id.* at 46.

760. *Id.* at 49.

761. *Id.* at 66.

762. *Id.* at 65-70.

763. *Id.* at 70-72.

764. *See* 41 U.S.C. § 605(a) (2000); *see also* FAR, *supra* note 11, § 33.206(b) (implementing this statutory requirement).

765. 48 Fed. Cl. 566 (2001).

766. *Id.* at 567-68.

767. *Id.* at 568-69.

Inspection, Acceptance, and Warranties

This Is Nothing Personal, Just Business

Federal agencies often have long-standing and sometimes warm relationships with contractors. Such relationships, however, should never hinder the government from asserting its legitimate contract rights. The Air Force learned that lesson the hard way in *Perkin-Elmer's Corp. v. United States*.[769]

In 1986, the Air Force awarded Perkin-Elmer's Corp. (Perkin) a contract to produce a "portable wear metal analyzer (PWMA)."[770] The Air Force accepted 133 PWMAs between 1988 and 1990. In 1991, an independent testing firm informed the Air Force that the PWMAs failed to meet contractual requirements. In 1991 and 1992, the Air Force informed Perkin that it might exercise its contractual rights against Perkin. During 1993, the Air Force tried to negotiate a settlement of the defects with Orbital Science Corporation, a company that bought Perkin.[771] Between this time and 1995, the Air Force failed to settle the dispute and initiated a False Claims Act[772] investigation against Perkin. In 1996, the Air Force revoked acceptance of the PWMAs and demanded $8,315,253.80 from Perkin. In 1997, the Air Force hired an expert to pinpoint the defect in the PWMAs, and then repeated its demand for $8,315,253.80.[773]

At the COFC, Perkin moved for summary judgment, arguing that the government's six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on its claim.[774] The Air Force countered that six years was a reasonable time "given its contractual relationship and lengthy history with Perkin-Elmer."[775] The court disagreed, focusing on the initial report from the testing firm in 1991: "[T]he government's revocation, which came more than six years after it first learned of the alleged defect, was not timely."[776]

The lesson is that agencies should exercise their revocation rights even if pursuing other alternatives. That may be difficult to do, especially during settlement negotiations. Nonetheless, failure to timely exercise revocation rights may waive a contractual remedy.

Better Eat Your Wheaties

Federal agencies may use warranties to allow for contractual remedies for defects discovered after acceptance.[777] The Defense Personnel Support Center relied on such a warranty to revoke acceptance of defective oatmeal in *Shelby's Gourmet Foods*.[778] In *Shelby*, a Department of Agriculture inspector accepted the proffered oatmeal on behalf of the government, but a "subsistence quality auditor" later rejected the same oatmeal.[779] Specifically, the food auditor found that the oatmeal cans had defects such as "incomplete tucks and improper crimping" and had failed the "bell jar test."[780] When the government revoked its earlier acceptance based on these defects, the contractor protested, arguing that the government's original acceptance was conclusive.[781] The board disagreed, holding that "the warranty clause survives final acceptance and provides remedies to the government in addition to those provided by the standard inspection clause."[782] Practitioners should use this case as a reminder to rely on any available remedies when seeking to revoke acceptance of proffered goods or services.

768. *Id.* at 572-73. The court also specifically noted that throughout the seven-year period the government was aware the contractor would be filing a claim, implying that it should have preserved its evidence better. *Id.* at 573.

769. 47 Fed. Cl. 672 (2000).

770. *Id*. at 673. "PWMAs are instruments designed to evaluate the condition of aircraft engines by analyzing the concentration of various metals in the engines' oil." *Id*.

771. *Id*. at 673.

772. 31 U.S.C. § 3729 (2000).

773. *Perkin-Elmer's*, 47 Fed. Cl. at 673.

774. *Id*. at 675.

775. *Id*. The Air Force also argued that it did not learn the precise reason for the defect until it received the expert report in 1997. *Id.*

776. *Id*. at 676.

777. FAR, *supra* note 11, § 46.702(b)(1).

778. ASBCA No. 49883, 01-1 BCA ¶ 31,200.

779. *Id*. at 154,040. As military service members, we wonder why a DOD entity was buying anything from a purveyor of "Gourmet Foods."

780. *Id*.

781. *Id*.

Pricing of Adjustments

Heads I Win, Tails You Lose?

The CAFC this past year upheld the COFC's decision to grant *quantum valebant* relief on a contract that contained an invalid Economic Price Adjustment (EPA) clause.[783] In *Barrett*, the contractor had four contracts with the Defense Fuel Supply Center to supply jet fuel. Each of the contracts was for a fixed price, but contained an EPA clause that was based upon the monthly average sales price of refined petroleum. The contractor instigated litigation before the COFC to have these EPA clauses invalidated because the FAR does not permit adjustments based upon cost indexes for the end-product itself.[784] Once the COFC held that the clauses were invalid, the government argued that the entire contract was invalid because that left the price term indefinite.[785] The COFC and the CAFC disagreed and held that the parties had a valid contract containing an "implied-in-fact promise by the government to pay at least fair market value for the fuel."[786]

Be Careful What You Propose

This past year's decision in *NavCom Defense Electronics, Inc.*,[787] serves as a reminder of just how difficult it is for contractors to demonstrate they are entitled to a jury verdict method of proof.[788] In that case, the Navy awarded NavCom Defense Electronics, Inc. (NavCom), a contract to produce the follow-on to the AN/UPM-137A, Identification of Friend or Foe Radar Test Set.[789] During production, NavCom submitted a request for equitable adjustment in which it alleged the government had given it defective government furnished equipment (GFE) and technical manuals covering the GFE and that it had to modify its designs and order different materials to compensate for these defects.[790]

The board ruled in favor of NavCom on several of the alleged defects,[791] but also ruled that NavCom was not entitled to rely upon the jury verdict method when it came to computing entitlement on the claim.[792] The board specifically noted that as "a part of its proposal, NavCom described a project management system it planned to use" on the contract, which, according to a government expert witness, should have been sufficient to document and track the costs associated with the changed work.[793]

COE's Project Was All Wet, Justifying Use of Modified Total Cost Method

The COFC decision in *Baldi Brothers Constructors v. United States*,[794] stands in stark contrast to the *NavCom* decision discussed previously. In *Baldi Brothers*, the COFC, without difficulty, decided the contractor could make use of the modified total cost method to prove its damages. The Navy had

782. *Id*. at 154,041. Incidentally, because of this case's lengthy litigation, "after the expiration of the 18 month shelf life of the oats, the entire shipment was destroyed." *Id.*

783. Barrett Refining Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001), *aff'g* 45 Fed. Cl. 166 (1999).

784. Barrett Refining Corp. v. United States, 45 Fed. Cl. 166, 167 (1999). The FAR permits adjustments based upon indexes, but only for labor or material indexes, not the end-product itself. *See* FAR, *supra* note 11, § 16.203-1.

785. *Barrett Refining Corp*., 242 F.3d at 1059.

786. *Id*. at 1059-60 (citing *Barrett Refining Corp*., 45 Fed. Cl. at 170). Thus far, all the litigation in this area has been brought by contractors seeking to obtain a larger adjustment than they would have otherwise been entitled to under the invalid EPA clauses. It would be interesting to see how a court or board would handle a scenario in which the government was seeking to invalidate an EPA clause in order to achieve a smaller adjustment where fair market values are less than the EPA adjusted amount.

787. Nos. 50767, 52292-98, 2001 ASBCA LEXIS 318 (July 25, 2001).

788. There are actually four methods of proving damages: (1) the actual cost method where the contractor submits actual cost data to demonstrate its additional costs associated with a change; (2) the estimated cost method where the contractor does not have actual cost data and submits estimates of those costs instead; (3) the total cost method where the contractor submits all costs—not just those associated with the change—and asserts the government is liable for the total cost incurred by the contractor; and (4) the jury verdict where the contractor submits competent evidence of its damages, but the government counters with conflicting evidence which questions the accuracy of the contractor's computations. *See* Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 321-24 (1989), *aff'd* 909 F.2d 1495 (Fed. Cir. 1990).

789. *NavCom Defense Electronics*, 2001 ASBCA LEXIS 318, at *4.

790. *Id.* at *175.

791. *Id.* at *221-22.

792. *Id.* at *235-39.

793. *Id.* at *224-27.

794. 50 Fed. Cl. 74 (2001).

hired Baldi Brothers Constructors (Baldi Bros.) to construct a tank training range at Camp Lejeune in North Carolina. This range consisted of a control tower, firing positions, impact berms, and tank trails for the tanks to drive upon. The tank trails required the removal of dirt and the impact berms required the addition of dirt. The boring logs accompanying the bid documents portrayed the site as a well-graded silt and sand mixture that could be excavated easily using conventional earthmoving equipment.[795]

Post-award, the government told Baldi Bros. that about eighty percent of the site was federally protected wetlands and that it would not be able to transport dirt through these areas. The soil condition in the non-protected portion of the site was also super-saturated.[796] This forced the contractor to use alternate earthmoving equipment, caused a lot of its equipment to become stuck in the soil, caused the work to be halted while the government developed new designs for the site, and required a large amount of the work to be re-done due to soil collapses.[797]

The court found that Baldi Bros. had met the prerequisite requirement of showing the impracticability of proving its actual losses because,"due to the snowball effect of the wetlands on the project plans, it would be easier for plaintiff to identify the items of contract performance that proceeded as planned, rather than the difference in costs between all aspects of the original plan and the work that the deviations occasioned."[798] The court faulted Baldi Bros., however, for using an overly optimistic earthmoving rate that assumed the optimal rather than average soil and surface conditions. The court, therefore, revised Baldi Bros.'s bid to reflect an average earthmoving rate.[799] As a result, the contractor was entitled to only $838,651.40 out of its claimed $1,528,537.[800]

Value Engineering Change Proposals

Contractor Entitled to Healthy Share of Implied Cost Savings

In April 1995, the Navy awarded a contract to Sentara Health System (Sentara) to operate two Tricare health clinics in the Tidewater, Virginia, area. The Navy owned one of these clinics and Sentara owned the other.[801] The contract required Sentara to use a government-installed automated information system, the Composite Health Care System (CHCS), to make appointments and to generate and maintain patient records at the government-owned clinic. It also gave Sentara the option to use this system at the clinic it owned.[802] Sentara elected instead to use a self-designed Patient Management System (PMS) at the contractor-owned clinic that performed these same functions except that it used different data fields. The contract required Sentara to generate monthly patient statistic reports covering both clinics. Sentara developed a patch that converted the PMS data into CHCS format to generate these statistical reports.[803]

795. *Id.* at 75.

796. *Id.* at 76-77. The contractor was unable to discover this differing site condition pre-award because the site was inaccessible due to thick vegetation that surrounded the site. *Id.* at 76 n.7.

797. *Id.* at 80.

798. *Id.*

799. *Id.* at 82-83. The Navy requested a bid revision to reflect the actual, poor surface/soil conditions, but this was rejected by the court. *Id*.

800. *Id*. at 78, 85.

801. Sentara Health Sys., ASBCA No. 51540, 00-2 BCA ¶ 31,122, *motion for reconsideration denied,* 2001-1 BCA ¶ 31,198.

802. *Id*. at 153,719.

803. *Id.* at 153,720.

Post-award, the DOD developed the Ambulatory Data System (ADS) which involved additional data fields beyond those contained in CHCS. The DOD forced the Navy to implement the ADS at all of its health clinics, including contractor-owned clinics operated by DOD contractors.[804] The Navy, in-turn, notified Sentara of this "proposed change" to the information system requirements and asked it to submit a proposal covering that change. Sentara's proposal included a one-time training cost of $27,707 and an annual implementation cost of over $2 million, which the contracting officer believed was excessive. As the contract contained FAR 52.248-1, Value Engineering, Sentara also indicated in its change order proposal that it could use an alternate approach to the ADS system that would "save the government about $2 million."[805] This alternate approach involved modifying the PMS slightly and then using the modified PMS at both clinics.[806]

The contracting officer believed that the ADS implementation cost was excessive and, therefore, did not actually modify the contract to direct its implementation. Sentara, on it own initiative and without cost to the government, coordinated with DOD Tricare officials and determined a way PMS could be used in lieu of the ADS. Upon learning that Sentara had successfully tested the modified PMS system, the contracting officer sent Sentara a change order directing it to use the modified PMS system for the required automatic information system at both clinics.[807]

Sentara complied with the modification, but submitted a Value Engineering Change Proposal (VECP) in which it calculated it had generated annual cost savings for the government of $1.18 million by using the modified PMS in place of the ADS. The contracting officer rejected Sentara's VECP because the government had never modified the contract to include any requirement to implement the ADS. According to the contracting officer, without any contractual requirement to implement the ADS, there were no savings realized by the use of the modified PMS.[808]

The ASBCA disagreed, holding that although the obligation to implement the ADS was never expressly placed into the contract, Sentara nevertheless had an implied obligation to do so. Consequently, it had a "contractual obligation to provide the work that its proposal eliminated" which resulted in cost savings to the government, and justified the government paying Sentara a portion of those savings under the Value Engineering clause.[809]

Terminations for Default

A-12 Termination Upheld—Is This Finally the End?

Over ten years after McDonnell Douglas and General Dynamics first challenged their default termination,[810] the COFC dismissed the plaintiffs' complaint and entered judgment for the government in *McDonnell Douglas Corp. v. United States*.[811] On remand, the CAFC directed the COFC to determine a relatively narrow issue—whether the plaintiffs were in default at the time the government terminated the contract. Within the constraints set by the appellate court, Judge Hodges upheld the Navy's 1991 default, finding that the "Navy's unilateral modification establishing a new schedule . . . was reasonable" and that a "Contracting Officer acting with discretion rationally could have determined that the contractors would not have" met the newly established deadline.[812]

In 1988, McDonnell Douglas and General Dynamics "contracted with the Navy to produce eight A-12 stealth aircraft."[813] The multi-billion dollar, fixed-price, incrementally funded contract required the contractors to deliver the first aircraft in June 1990.[814] The contractors experienced performance difficulties from the beginning, requiring a delivery schedule extension.

804. *Id.*

805. *Id.* at 153,720-21.

806. *Id.* at 153,721.

807. *Id.* at 153,722.

808. *Id.* at 153,722-24.

809. *Id*. at 153,724.

810. *See* McDonnell Douglas Corp., v. United States, 35 Fed. Cl. 358 (1996) [hereinafter *McDonnell Douglas I*]. The Navy terminated the A-12 contract on 7 January 1991. McDonnell Douglas and General Dynamics sued for relief soon after. The A-12 was a full-scale engineering and development contract for a carrier-based stealth aircraft. *Id.* See *McDonnell Douglas I* for a full discussion of the facts.

811. McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311, 314 (2001) [hereinafter *McDonnell Douglas III*].

812. *Id*. at 313.

813. *Id.*

814. McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1322 (Fed. Cir. 1999) [hereinafter *McDonnell Douglas II*].

When the parties could not agree to a new delivery date, the Navy unilaterally issued a schedule modification on 17 August 1990, calling for "first flight" by 31 December 1991.[815]

In November 1990, the contractors requested that the government restructure the contract as a cost reimbursement type contract.[816] After a series of high-level discussions, reaching the President of the United States,[817] the Secretary of Defense refused to restructure the contract. The Navy then terminated the contract for default in January 1991.[818]

The plaintiffs challenged the termination, and in 1996 the COFC vacated the default termination and converted it to a termination for convenience. Judge Hodges found that the termination was improper because, due to political pressure, the contracting officer "was not permitted to exercise reasoned discretion" and the termination was "not related to performance."[819] On appeal, the CAFC reversed, finding that the government's default termination was performance-related.[820] The CAFC directed the COFC to determine whether the contractors were in default.[821]

On remand, the government argued that the "contractors were not making progress toward the December 1991 first flight schedule."[822] The plaintiffs argued that the "Navy's unilateral schedule was unreasonable and therefore unenforceable."[823] Alternatively, the plaintiffs argued that the government had waived the new schedule.[824]

Courts will only enforce a unilaterally imposed schedule change if the time for performance is reasonable.[825] On remand, the COFC reviewed the Navy program manager's efforts to impose a reasonable schedule. The COFC considered the information the program manager had, the efforts the program manager took to obtain this information, and the persons with whom the program manager coordinated.[826] In addition, the COFC seemed to give considerable weight to the subjective intent of the Navy officials. For example, the COFC quoted the program manager's testimony that he interpreted secretarial guidance on the scheduling issue to be:

> [D]on't go out and try to be a big hero and have a schedule to get somewhere that is not achievable. Make sure you build in the type of contingency and buffer time that's necessary to ensure that in going forward in a restructuring we've allocated enough time that we don't need to go back and restructure and reschedule again. Give yourself the room in this first restructuring, one bite at the apple more or less.[827]

That the "Navy wanted a reasonable schedule"[828] was an important factor in the COFC's finding that the schedule was, in fact, reasonable. Because the contractors conceded they were not going to make the first flight deadline, the COFC sustained the default termination.[829]

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815. *McDonnell Douglas III*, 50 Fed. Cl. at 313.

816. *Id. See also McDonnell Douglas II*, 182 F.3d at 1322.

817. In late 1990, Secretary of Defense Cheney briefed the President of the United States. Later, the Office of the Secretary of Defense sent a memorandum to the Navy directing the Navy to "show cause by January 4, 1991, why the Department should not terminate the A-12 program." *McDonnell Douglas III*, 50 Fed. Cl. at 313-14. As a result, the Navy sent a cure notice to the contractors on 17 December 1990. The contractors responded by denying they were in default and requesting "equitable restructure" under the President's authority under Public Law Number 85-804 (authorizing extraordinary relief to promote national defense). *Id.* at 314. "Secretary Cheney met with Navy Secretary Garrett, Under Secretary Yockey, and the Chairman of the Joint Chiefs of Staff and decided not to grant 85-804 relief." *Id*. The next day, the Navy's contracting officer terminated the contract. *Id.*

818. *Id.*

819. *Id.* at 314-15.

820. *Id.* at 315. *See also McDonnell Douglas II*, 182 F.3d at 1326.

821. *McDonnell Douglas III*, 50 Fed. Cl. at 315.

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.* at 316 (citing DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969)).

826. *Id.* at 316-19.

827. *Id.* at 317.

828. *Id.*

Federal Circuit Rejects Economic Duress Defense to Contract Reinstatement

In *Balimoy Manufacturing Co. of Venice v. Caldera*,[830] the CAFC considered appellant's economic duress defense to a contract reinstatement following a default termination. The government awarded appellant, Balimoy Manufacturing Co. of Venice (Balimoy), a contract to produce two million twenty-millimeter ammunition shells. Balimoy missed the delivery deadlines, and the government terminated the contract.[831]

The government reinstated the contract, "but only to the extent of one million shells."[832] Both parties signed Modification P00001 reinstating the contract.[833] The modification stated that it was: a "partial termination,"[834] a "compromise between the parties," and a "full release and accord and satisfaction as to any and all claims . . . arising under or related to the Notice of Termination."[835] After several additional modifications and deadline extensions, Balimoy failed to the meet the revised delivery schedules. The government terminated the remainder of the contract. Initially, the government terminated the contract for default, but later changed this second termination to a convenience termination.[836] Each party proposed a settlement agreement that the opposing party rejected.[837]

Balimoy alleged that Modification P00001 was unenforceable due to economic duress arising from three sources: (1) an improper first default termination, (2) undue pressure to accept Modification P00001 "in lieu of a threat" of continued termination, and (3) the government's alleged "prohibiting of Balimoy's performance to obtain Balimoy's acquiescence to Modification P00001."[838]

The CAFC found that economic duress required (1) involuntary acceptance of another's terms, (2) lack of other reasonable alternatives, and (3) coercive acts by the opposite party.[839] The court did not address the substance of Balimoy's duress allegations, that is, the coerciveness of the government's acts. Instead, the CAFC found that Balimoy's acceptance of the modification was voluntary, "being motivated by a desire to remove the stigma of the termination for default."[840] In addition, Balimoy had two alternatives to agreeing to the modification: "appealing the first default termination" and "further negotiating the price of the reinstated quantity."[841] The CAFC, therefore, affirmed the board's finding that there was no economic duress.[842]

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829. *Id.* at 319. McDonnell Douglas also argued that the government waived the new schedule. *Id.* Although there was some evidence that Navy officials would have accepted a later first flight date, "the Government does not relinquish its right to terminate a contract merely because in this case the Navy wanted the plane." *Id.* at 319 n.11. In addition, an element of waiver is reliance and there was "no evidence that the contractors relied" on a later "deadline to their detriment." *Id.* at 319.

830. No. 99-1037, 2000 U.S. App. LEXIS 26702 (Fed. Cir. Sept. 29, 2000).

831. *Id.* at *1-2.

832. *Id.* at *2.

833. *Id.* Federal Acquisition Regulation section 49.102(d), Reinstatement of Terminated Contracts, provides:

> Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that—
>
> (1) Circumstances clearly indicate a requirement for the terminated items; and
>
> (2) Reinstatement is advantageous to the Government.

FAR, *supra* note 11, § 49.102(d).

834. The document failed to explicitly disclose whether the parties intended a partial termination for convenience or a partial termination for default. The court found that the parties' course of dealing indicated this was a partial termination for default. *Balimoy,* 2000 U.S. App. LEXIS 26702, at *10-11.

835. *Id.* at *2.

836. *Id.* at *3.

837. *Id.* at *3-4. Balimoy rejected the government's expense figures and appealed to the ASBCA. Balimoy then submitted its own settlement claim to the government. The government did not respond and "was therefore deemed to have denied" the claim. Balimoy appealed the deemed denial and the board consolidated the two appeals. *Id.* at *4.

838. *Id.* at *12-13.

839. *Id.* at *13 (citing Sys. Tech. Assocs. v. United States, 699 F.2d 1383, 1387 (Fed. Cir. 1983)).

840. *Id.* Because the modification was a partial default termination, Balimoy would have avoided only the stigma of a complete termination.

841. *Id.*

Plaintiffs rarely allege economic duress in government procurement cases. *Balimoy* does not provide any additional incentive to make use of the defense.

Defective Specifications and Relaxed Treatment of Reprocurement Contractor Invalidate Default Termination

In *Marshall Associated Contractors, Inc.*,[843] the Bureau of Reclamation (BOR) established a prima facie case for a termination for default, when the contractor, Marshall Associated Contractors, Inc. (Marshall), failed to deliver the contracted amount of sand by the contract delivery dates.[844] The Department of the Interior Board of Contract Appeals (IBCA), nonetheless, converted the default termination to one for convenience because the board found four grounds showing that the default termination decision was an abuse of discretion.[845]

First, the board found that defective design specifications severely hampered Marshall's ability to perform in a timely manner.[846] Second, the contracting officer denied Marshall's earlier claims (concerning defective specifications and differing site conditions) without "the fully considered evaluation they deserved."[847] Third, Marshall's failure to deliver the contracted sand amount did not prejudice the government because the government had sufficient sand to meet its then-current requirements. Finally, the IBCA observed three ways in which the BOR treated the reprocurement contractor, Fisher Sand and Gravel (Fisher), much better than it had treated Marshall.[848]

First, the BOR "substantially relaxed and improved upon its specifications" in the reprocurement contract.[849] Second, the reprocurement contract paid Fisher three times Marshall's price to deliver less sand in the same amount of time. Finally, even though Fisher also "fell seriously behind schedule," the BOR did not default Fisher or seek liquidated damages.[850] This disparate treatment, coupled with the other factors, compelled the board to find that the contracting officer abused his discretion in terminating Marshall's contract.

Contract Administration Flaws Cause Reversal of Postal Service Default Termination

In *Abcon Associates, Inc.*,[851] the contractor missed two construction deadlines, causing the government to terminate the contract for default.[852] The COFC found, however, that the USPS breached its duty of good faith, thereby excusing the contractor's default.[853] The construction contract was divided into two phases.[854] After the contractor missed the phase one completion date, the government assessed liquidated damages (LDs).[855] The *USPS Procurement Manual*, however, only authorized the government to assess LDs after the final completion date, absent a special clause in the contract. This contract did not specially authorize imposing LDs after a missed phase deadline.[856] The improper imposition of LDs "substantially impeded plaintiff's ability to perform" the contract.[857] Addi-

842. *Id.*

843. IBCA Nos. 1091, 3433-3435, 01-1 BCA ¶ 31248.

844. *Id.* at 154,256.

845. *Id.* at 154,260.

846. *Id.* at 154,258-59.

847. *Id.* at 154,259.

848. *Id.*

849. *Id.*

850. *Id.*

851. 49 Fed. Cl. 678 (2001).

852. *Id.* at 686.

853. *Id.* at 690.

854. *Id.* at 679.

855. *Id.* at 683.

856. *Id.* at 688-89.

857. *Id.* at 689.

tional USPS actions fell "below the standard of good faith."[858] A "mindless directive" from the on-site engineer, coupled with the government's failure to respond to repeated requests for information, "precipitated a long delay."[859] In all, the COFC found that "neither party lived up to its responsibilities under the contract."[860] Therefore, the court converted the default termination to a convenience termination.[861]

Anticipatory Repudiation and Adequate Assurances After CAFC's Danzig v. AEC Corp.

Last year, discussing *Danzig v. AEC Corp.*,[862] the *Year in Review* highlighted a CAFC decision upholding a default termination for the contractor's failure to provide adequate assurance of timely performance.[863] This year, in *Omni Development Corp.*,[864] the Department of Agriculture Board of Contract Appeals made it clear that, even after *Danzig*, when the government bases a default termination on inadequate assurances of timely performance, the "inadequate assurance" must relate to performance of the whole contract. The government cannot default terminate a contract for anticipatory repudiation when a contractor represents that it will miss interim deadlines, but asserts it will complete the contract on time.[865]

Much Ado About Nuts

In *Giesler v. United States*,[866] the CAFC reversed the COFC's order rescinding a contract between appellant, doing business as Central Park Co. (Central Park), and the government. In January 1995, the DLA issued a solicitation for "Nuts. Mixed, Shelled . . . CID A-A-20164."[867] As appellant's president knew, CID stood for "Commercial Item Description." This particular code specified a "mixed nut composition containing not more than 10% peanuts by weight."[868]

Acting through a broker, the appellant identified Flavor House as its nut supplier for this solicitation.[869] Apparently neither Central Park nor Flavor House read the specification setting the maximum peanut content at ten percent.[870] In February 1995, Central Park submitted the low bid, and upon government request, verified its bid price.[871] In March, the government conducted a pre-award survey of Flavor House. Soon after the pre-award survey, Flavor House faxed the government specifications that indicated that Flavor House's mixed nuts included sixty percent peanuts. Not perceiving the discrepancy between the solicitation and Flavor House's proposal, the government awarded the contract to Central Park in April 1995. A government inspection in June indicated that Flavor House's nut mix was nonconforming. Unable to renegotiate the contract, the appellant failed to deliver the nuts on schedule. The DLA terminated the appellant's contract for default.[872] Central

858. *Id.* at 690.

859. *Id.*

860. *Id.*

861. *Id.* at 690-91.

862. 224 F.3d 1333 (Fed. Cir. 2000).

863. *2000 Year in Review, supra* note 2, at 50.

864. AGBCA Nos. 97-203-1, 98-182-1, 01-2 BCA ¶ 31,487.

865. *Id*. at 155,462 ("*Danzig* does not hold that a contractor who fails to meet or who advises the Government that it cannot precisely meet an interim deadline set by the Government in a cure notice, is per se subject to a termination for default, without more."). At least three Board of Contract Appeals decisions this year cited *Danzig* for the traditional proposition that a "default termination is justified if the contractor repudiates the contract and fails to give reasonable assurances of performance in response to a validly issued cure notice." G&G Western Painting, ASBCA No. 50492, 01-2 BCA ¶ 31,492 at 155,484 (quoting from *Danzig). See also* EFG Assocs., Inc., ASBCA Nos. 50546, et al., 01-1 BCA ¶ 31,324 at 154,729 (abandonment coupled with contractor's express assertions that contract was terminated "was tantamount to an unequivocal refusal to perform . . . otherwise known as an 'anticipatory repudiation,' which was a legally supportable basis" to default terminate); Graham Int'l, ASBCA No. 50360, 01-1 BCA ¶ 31,222 at 154,111(citing *Danzig* as an example of a valid anticipatory repudiation and holding that "[b]y stopping work, . . . notifying the government that it 'hereby stops all work' the next day, releasing its work force and twice encouraging a default termination," the contractor manifested a "positive, definite, unconditional, and unequivocal intent not to render the required performance").

866. 232 F.3d 864 (Fed. Cir. 2000).

867. *Id.* at 867.

868. *Id.* at 870.

869. *Id.* at 867.

870. *Id.* at 870.

871. *Id.* at 867-68.

Park challenged the termination at the COFC. The COFC found that

> although Central Park had erred in failing to read the specification, the government's receipt of the March 29, 1995 facsimile from Flavor House gave it constructive knowledge that Central Park intended to supply a non-conforming nut mix. The trial court determined that the government had a duty to notify Central Park of this error, and that because the government failed to do so, Central Park should be granted rescission of the contract.[873]

According to the CAFC, a contract may be reformed or rescinded only if a contractor establishes that a bid error resulted from a "clerical or arithmetical error, or a misreading of the specifications."[874] Even if an error is otherwise inexcusable, "if the government has breached its explicit regulatory duty to examine the contractor's bid for mistakes," then a court may rescind a contract.[875]

In the instant case, however, the court found that "Central Park's conduct was not an excusable 'misreading' of the specification, but rather amounted to gross negligence in failing to read the specification and a clear error in business judgment."[876] The court continued, "[W]e cannot imagine any circumstance in which a non-reading can be a 'misreading.'"[877] Concerning the government's conduct, the court found "the government's duty to examine contractors' submissions for mistakes only pertains to errors contained in contractors' bids. Under the FAR, this duty does not extend to errors that may be contained in a contractor's subsequent filings."[878] The CAFC concluded that the COFC erred in holding that Central Park deserved rescission of the contract.[879]

Terminations for Convenience

No Monday Morning Terminating: CAFC Rejects Retroactive Constructive Convenience Termination

The government's right to terminate a contract for convenience is broad, but not boundless. In *Ace-Federal Reporters Inc. v. Barram*,[880] the CAFC limited the government's right to retroactively terminate a contract for convenience. In *Ace-Federal Reporters*, the CAFC found that the government breached a partial, or non-exclusive, MAS requirements contracts for transcription services.[881] The government violated the terms of these novel contract types by contracting for covered services with companies that were not parties to the schedule contracts.[882]

Ace-Federal brought a claim to the GSBCA for breach of contract and sought lost profits. Regarding damages for the contract breach, the government argued that the breach should be treated as a constructive termination for convenience and that the termination for convenience clause precluded recovery of lost profits.[883] The government asserted that the GSBCA should have "impose[d] a constructive termination for convenience . . . to the extent unauthorized off-schedule purchases were made, in effect multi-, mini- terminations for conve-

872. *Id.* at 868.

873. *Id.* at 868-69.

874. *Id.* at 869.

875. *Id.*

876. *Id.* at 870-71.

877. *Id.* at 871.

878. *Id.* Federal Acquisition Regulation section 4.407-1 provides,

> After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake.

FAR, *supra* note 11, § 14.407-1.

879. *Giesler*, 232 F.3d at 877.

880. 226 F.3d 1329 (Fed. Cir. 2000).

881. *Id.* at 1333. The contracts did not "fit neatly" into the commonly recognized contract types: definite quantity, ID/IQ, or requirements. *Id.* at 1332. In essence, the contracts were multiple, or non-exclusive, requirements contracts. Nonetheless, the court found them valid and enforceable. *Id.* This facet of the case is discussed in further detail in this article *supra* notes 158-62 and accompanying text.

882. *Ace-Federal*, 226 F.3d at 1331.

nience."[884] The court, however, firmly rejected the government's assertion that a fully and properly performed contract could be terminated for convenience retroactively.[885] Apparently exasperated with the government's reluctance to accept responsibility for its breach of contract, the court concluded:

> We see no reason in law or logic to impose a retroactive constructive termination for convenience here. The concept is a fiction to begin with, but there has to be some limit to its elasticity. The contractors stood ready to perform throughout, did perform those orders placed, and the contract ended.[886]

The message to the government is, if you are going to develop novel contract types, comply with the contract terms, and if you do not, be prepared to pay lost profits.[887]

Settlement Proposal Due Dates: How Do You Measure a Year?[888]

Following a convenience termination, contractors have one year "from the effective date of termination" to submit a termination settlement proposal to the government or to request an extension in writing.[889] In *Swanson Group*,[890] the plaintiff challenged the government's default termination at the ASBCA. The board, on 7 November 1997, sustained the plaintiff's appeal and converted the default termination to a termination for convenience. The board mailed a copy of the decision that the plaintiff received on 17 November 1997. In a 10 November 1998 letter, the plaintiff requested a one-year extension to submit its settlement proposal.[891]

The board rejected the government's argument that the plaintiff's deadline was 6 November 1998, one year from the date of the board's original decision. Instead, the board found that the 10 November 1998 extension request was timely, because the one-year period began to run upon notice of termination, which occurred on 17 November 1997, when the plaintiff received the board's decision.[892]

Another ASBCA decision points out that the government risks waiving the untimeliness of a settlement proposal. In *Consolidated Defense Corp.*,[893] the government moved for summary judgment, arguing that the appellant failed to submit its settlement proposal in a timely manner.[894] Although the government conceded that appellant submitted an interim termination for convenience settlement proposal (TFCSP) within the one-year time limit, the government rejected the interim TFCSP as "incomplete or incorrect."[895] The agency did not receive a TFCSP acceptable to it within one year. The board found that the interim TFCSP was not "so flawed" as to be "meaningless" and therefore, "based on continued negotiations, partial payments, and [a] delayed assertion of an untimely TFCSP" the "Government waived any alleged untimeliness."[896]

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883. *Id.* at 1331.

884. *Id.* at 1333.

885. *Id.*

886. *Id.* at 1333-34.

887. In traditional requirements contracts, purchasing supplies or services from an entity other than the awardee is sometimes referred to as diversion. A recent ASBCA case, citing *Ace-Federal*, held that "diversion is not remediable under the termination for convenience clause in a contract after the contract has been performed." T&M Distrib., ASBCA No. 51279, 01-2 BCA ¶ 31442 at 59 (June 5, 2001). *T&M* emphasized that "allegations of bad faith, abuse of discretion, or arbitrary or capricious action are not essential for a claim for lost profits for improper diversions under a requirements contract." *Id.* at 60. For further discussion of the *T&M* decision, see *supra* notes 134-42 and accompanying text.

888. CAST OF RENT, *Seasons of Love*, *on* RENT (Dreamworks 1996).

889. *See* FAR, *supra* note 11, § 52.249-2(e), -3(e), -6(f). If the contractor fails to submit a proposal, the contracting officer may unilaterally determine the amount due the contractor. *Id.* The effective date of termination means: "the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received." *Id.* § 2.101.

890. ASBCA No. 52109, 01-1 BCA ¶ 31,164.

891. *Id.* at 153,928.

892. *Id.* at 153,930.

893. ASBCA Nos. 52315, 52719, 01-2 BCA ¶ 31,484.

894. *Id.* at 155,428.

895. *Id.* at 155,430.

896. *Id.* at 155,430-31.

Convenience Termination Expenses

In *Walsky Construction Co.*,[897] the ASBCA, on the government's motion for summary judgment, ruled on three elements of appellant's claim for convenience termination expenses. First, the board reiterated the "well-settled" rule that "post-termination unabsorbed overhead is not recoverable."[898] Conversely, the board found some authority for recovery of "standby or idle equipment costs after" termination.[899] Finally, the board held that legal expenses to defend against a default termination are not "reasonably necessary for the preparation of termination settlement proposals," and therefore are not recoverable as part of a termination claim.[900]

Definitional Housekeeping

On 15 August 2001, the FAR Council issued a proposed rule moving the definitions of "continued portion of the contract," "partial terminations," and "terminated portion of the contract" from FAR section 49.001 to FAR section 2.101.[901] The rule also replaces the abbreviated definition of "termination for convenience" in FAR section 17.103[902] with a fuller definition to be placed at FAR section 2.101: the "exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the government's interest."[903] The proposed rule moves the remainder of FAR section 17.103, explaining the distinction between cancellation and termination for convenience, to the newly created FAR section 17.104(d). Finally, the proposed rule adds a definition of "termination for default": the "exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual provisions."[904] As the Council intended, these amendments do not appear to "make any substantive changes to the FAR."[905]

Contract Disputes Act Litigation

Jurisdiction

CDA Not a One-Stop Shop

The Contract Disputes Act (CDA),[906] unlike the Tucker Act, allows for interest on a claim calculated from the date on which the claim was filed with the contracting officer until the date of judgment.[907] Hence, it is attractive to disgruntled contractors who seek redress on government contracts, especially those with high dollar-value claims. As the next few cases illustrate, not all government contract claims, however, are CDA claims.

In *Florida Power & Light Co. v. United States*,[908] the COFC rejected the argument that claims against the Department of Energy (DOE) involving the transfer of title of mined uranium from several utilities to the DOE was a "procurement" of property within the meaning of the CDA.[909] The contracts provided for the transfer of title of uranium to the DOE, who would enrich it and provide the enriched uranium to the utilities in their electricity-producing operations. The government was

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897. ASBCA No. 52772, 01-2 BCA ¶ 31,557.

898. *Id*. at 155,857 (citing Nolan Bros., Inc., 437 F.2d 1371 (Ct. Cl. 1971); J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA ¶ 25,053; Chamberlain Mfg. Corp., ASBCA No. 16877, 73-2 BCA ¶ 10,139; Tech., Inc., ASBCA No. 14083, 71-2 BCA ¶ 8956). Post-termination unabsorbed overhead includes, for example, home office overhead costs incurred after termination. *Id*.

899. *Id*. (citing *Nolan Bros., Inc*., 437 F.2d 1371; Fiesta Leasing & Sales, Inc., ASBCA No. 29311, 87-1 BCA ¶ 19,622, *modified on other grounds*, 88-1 BCA ¶ 20,499). *See also* FAR, *supra* note 11, § 31.205-42(b).

900. *Walsky Construction Co.*, 01-2 BCA ¶ 31,557 at 155,858.

901. Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination, 66 Fed. Reg. 42,922 (Aug. 15, 2001) (to be codified at 48 C.F.R. pts. 2, 17, 33, 49, and 52).

902. Termination for convenience refers to the "procedure which may apply to any Government contract, including multi-year contracts." FAR, *supra* note 11, § 17.103.

903. 66 Fed. Reg. 42,922-23.

904. *Id.*

905. *Id.* at 42,922.

906. 41 U.S.C. §§ 601-613 (2000).

907. *Id*. § 611.

908. 49 Fed. Cl. 656 (2001).

909. *Id*. at 670. The CDA applies to contracts entered into by an executive agency for: "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. § 602(a).

responsible for disposing leftover depleted uranium if the utilities chose not to take it.[910] The court concluded that the transfer of title was "incidental" to the enrichment services and did not rise to the level of "procurement" or disposal" of property.[911] The court also found that the disposal of depleted uranium was an "illusory" government obligation because the utilities could elect to acquire the depleted uranium.[912]

If the Shoe Fits Someone Else, Let Them Wear It

The courts also will not hesitate to preclude CDA jurisdiction if the contract and surrounding circumstances indicate that claims under a government contract are better adjudicated under other statutes. In *Marine Logistics, Inc. v. Secretary of the Navy*,[913] the CAFC found a dispute between the Navy's Military Sealift Command and a cargo transporter to be within the scope of admiralty jurisdiction because the contract to ship cargo was "wholly maritime" in nature.[914] The court concluded that the dispute was better resolved under the Suits in Admiralty Act.[915] Therefore, the CAFC transferred the case to the district court.

In *Inter-Coastal Xpress, Inc. v. United States*,[916] the plaintiff entered into a four-year contract with DOD to deliver perishable goods to various locations. A dispute arose over holdover charges incurred by the plaintiff when shipments were held overnight.[917] After the plaintiff filed suit at COFC, the government moved to dismiss the claims, alleging that jurisdiction fell under the Interstate Commerce Act (ICA),[918] not the CDA.[919] The COFC agreed, noting that the tender agreements in the contract specifically referred to the ICA and that the ICA made no mention of the CDA.[920] In addition, the COFC noted that the ICA defines the general jurisdiction of the Surface Transportation Board as extending "over transportation by motor carrier and the procurement of that transportation."[921]

Bingo, I Win!

Except for specific exceptions applicable to military and National Aeronautics and Space Administration (NASA) exchanges, the CDA ordinarily will not apply to Nonappropriated Fund (NAF) contracts.[922] The government, however, may opt to include a disputes clause in non-military or non-NASA exchange NAF contracts to provide a quick and familiar forum in which to address any disputes. Is the government bound by a disputes clause in these situations even if it fails to respond to a claim? According to the ASBCA, the answer is yes.

In *Charitable Bingo Associates, Inc.*,[923] the board held that it had jurisdiction over a dispute between a NAF procurement office and an operator of bingo games because the contract included a disputes clause. The government, which had not issued a final decision on the claim for over a year, argued that the ASBCA had no jurisdiction because the contract did not

910. *Florida Power*, 49 Fed. Cl. at 658. The dispute arose over billing for uranium enrichment services provided by the U.S. Enrichment Corp. after it undertook the enrichment services previously provided by DOE. *Id.*

911. *Id*. at 671.

912. *Id*. About a month before this case was decided, the CAFC rejected the plaintiffs' attempt to circumvent the COFC's jurisdiction by seeking only "declaratory and injunctive relief" and then filing suit in the District Court for the Southern District of New York. *See* Consol. Edison Co. v. U.S. Dep't of Energy, 247 F.3d 1378 (Fed. Cir. 2001). The plaintiffs did so after the CAFC handed down a decision that made success of any sort unlikely in the Federal Circuit. *See* Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

913. No. 00-1528, 2001 U.S. App. LEXIS 20327 (Fed. Cir. Sept. 12, 2001).

914. *Id*. at *4.

915. 46 U.S.C. § 742 (2000).

916. 49 Fed. Cl. 531, 533 (2001).

917. *Id*. at 533.

918. 31 U.S.C. § 3726 (2000).

919. *Inter-Coastal*, 49 Fed. Cl. at 534-35. The government alleged that under the ICA, the suit was barred by the three-year ICA statute of limitations. *Id*.

920. *Id*. at 539.

921. *Id*. The government's victory was partial. The court held that some of the claims were not barred by the three-year statute of limitations imposed by the ICA. *Id*. at 542.

922. 41 U.S.C. § 602 (2000). *See, e.g.*, Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001) (holding that the Federal Housing Finance Board is a NAF that is precluded from CDA jurisdiction). For further discussion of the *Furash* decision, see *infra* notes 1759-63 and accompanying text. *See also* 28 U.S.C. §§ 1346, 1491 (2000) (exceptions to general rule for military and NASA exchanges).

923. ASBCA No. 53249, 01-2 BCA ¶ 31,478.

specifically include the language from the CDA that provides for appeals on deemed denials.[924] The ASBCA disagreed, noting that it had taken jurisdiction over disputes in the past that existed for a long period without a final decision.[925] It was unsympathetic to the NAF's contention that it needed information from the U.S. Army Criminal Investigation Command, which was conducting an investigation into Charitable Bingo Associates, Inc.'s, activities.[926] The important point is that the boards will read the inclusion of the disputes clause in a contract as granting them jurisdiction, even when the contract explicitly states that the contract is not subject to the CDA.[927]

What Time Zone Am I In?

A contractor must meet a deadline to file an appeal of a contracting officer's final decision whether it appeals to the COFC or to the ASBCA.[928] As the next two cases demonstrate, the contractor better not delay filing an appeal past those deadlines, regardless of what anyone tells them.

In *International Air Response v. United States*,[929] the COFC granted the government's motion to dismiss on the grounds that the contractor did not file its appeal until nineteen months after the final decision. The contractor argued that a month after the final decision, an Arizona district court with jurisdiction over False Claims Act (FCA) allegations related to the contract issued an order "staying the enforcement of the action by the contracting officer and staying any deadlines pertinent to that order for appeal or review."[930] In October, ten months after the final decision, the Arizona district court lifted the stay, noting that the issues in its case were different from those under the CDA. The contractor did not file its claim until July of the following year.[931]

Although the COFC acknowledged that the All Writs Act[932] allows courts to take action to facilitate their jurisdictions, "nothing in the All Writs Act gave the district court power to derogate from the jurisdiction of the COFC, or otherwise to affect the CDA's limitations provisions."[933] The court was unsympathetic to the contractor's contention that it was the district court's action that led to the late filing. It noted that the contractor had over six weeks after the stay was lifted to meet the deadline, that it had not done so until seven months after the stay was lifted, and that the district court's order lifting the stay had included language acknowledging different issues in the CDA suit and the FCA action.[934]

It Takes Two to Reconsider

In *Propulsion Controls Engineering*,[935] the ASBCA was steadfast in applying the ninety-day deadline despite the contractor's argument that the contracting officer's reconsideration extended the period for filing. The board, however, saw no evidence of reconsideration or that the contractor had been led to believe its claim was under reconsideration.[936] The board would not accept that the request, standing alone, was objective evidence that the contracting officer was reconsidering.

But beware. A contracting officer may take actions that can be construed as reconsidering a claim which could inadvert-

924. *Id*. at 155,411. Although the board held that it had jurisdiction over this appeal based on the disputes clause, it had earlier denied Charitable Bingo's petition for an order directing the NAF to issue a final decision. The denial was based on a contract provision that explicitly stated the contract was not subject to the CDA. *See* Charitable Bingo Assocs., Inc., ASBCA No. 52999-883, 01-1 BCA ¶ 31,194.

925. *Charitable Bingo*, 01-2 BCA ¶ 31,478 at 155,412.

926. *Id*. *But see* Laumann Mfg. Corp., ASBCA No. 50246, 01-2 BCA ¶ 31,441 (denying the government's motion for reconsideration to dismiss an appeal without prejudice because there was an ongoing grand jury investigation relating to the contractor's performance on the contract).

927. The disputes clause in the contract made clear that the contractor could appeal a contracting officer's final decision to the ASBCA. The disputes clause in the contract did not, however, mention a contractor's right under the CDA to request that the board direct a contracting officer to issue a final decision. *See* 41 U.S.C. § 605(c)(4).

928. The deadline for an appeal to the COFC is twelve months. *See id.* § 609(a). The deadline for an appeal to the ASBCA (or any board) is ninety days. *See id.* § 606.

929. 49 Fed. Cl. 509 (2001).

930. *Id*. at 511.

931. *Id.*

932. 28 U.S.C. § 1651 (2000).

933. *Int'l Air Response*, 49 Fed. Cl. at 512.

934. *Id*. at 515.

935. ASBCA No. 53307, 01-2 BCA ¶ 31,494.

936. *Id*. at 155,507.

ently extend the filing deadline. In *Arono v. United States*,[937] a contracting officer responded several times to inquiries from the contractor-lessor's attorney. At one point the contracting officer indicated that the "government looks forward to an amiable resolution of the problem."[938] Based on this and other correspondence that indicated the contracting officer was reconsidering his final decision, the COFC held that the appeal was timely filed nineteen months after the final decision.

The Prime Can Stand Even When the Sub Can't

It is well established that a prime contractor whose company has been liquidated through bankruptcy proceedings generally does not have standing to pursue an appeal. In *Triad Microsystems, Inc.*,[939] the board found a prime contractor lacked standing to pursue an appeal when it attempted to do so nearly two years after its Chapter 7 liquidation proceedings. The board looks to the bankruptcy law of the state in which a company is incorporated to determine whether it has standing to pursue its appeal after Chapter 7 liquidation proceedings.[940]

But what happens in a situation where a prime contractor sponsored a claim for a subcontractor who has since filed and completed liquidation proceedings? The ASBCA decided that the subcontractor's solvency does not really matter. In *Stan's Contracting Inc.*,[941] a prime contractor sponsored an appeal on behalf of a subcontractor who had encountered differing site conditions. The subcontractor was later indicted, partly because he used his company to evade income taxes. Eventually the subcontractor's company was liquidated under Chapter 7.[942] The board held that its jurisdiction "is dependent upon the status of the prime contractor and not on that of the subcontractor."[943]

Dirty Hands, Empty Pockets

In *Stan's Contracting*, allegations of misconduct were made against the subcontractor, not the prime contractor.[944] But can an unscrupulous prime contractor draw from the well after he's been caught defrauding the government?

In *AAA Engineering and Drafting, Inc.*,[945] a *qui tam* suit was brought against a contractor after he had submitted an appeal related to 8080 work orders. The suit, alleging that some of the work orders were fraudulent, ended with a judgment against the contractor.[946] A total of eighty work orders were admitted into evidence. The government moved to dismiss the appeal, claiming that the CDA precluded it from acting on a claim involving fraud.[947] The ASBCA disagreed with the government, concluding that it did have jurisdiction to consider AAA Engineering and Drafting's (AAA) excessive work claim even though "fraud allegedly may have been practiced in the drafting or submission of such claim."[948] Nonetheless, it denied the appeals, concluding that the doctrine of res judicata barred AAA from relitigating issues concerning the false work orders. The board found that it would be impossible to segregate the valid claims from the fraudulent ones because the "falsification of work orders in the instant appeals permeated the entirety of the claims."[949]

See a Trend Coming?

On 9 October 2001, the District of Columbia Board of Contract Appeals became the first such board to permit electronic filings (e-filings) of pleadings and other documents. The e-filing will be optional and documents containing protected and sensitive information will continue to be filed on paper. The

937. 49 Fed. Cl. 544 (2001).

938. *Id.* at 547.

939. ASBCA No. 52759, 01-2 BCA ¶ 31,440.

940. *See, e.g.*, Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under pertinent New York law).

941. ASBCA No. 51475, 01-2 BCA ¶ 31,556.

942. *Id.* at 155,852.

943. *Id.*

944. *See id.*

945. ASBCA Nos. 47940, 48575, 48729, 01-1 BCA ¶ 31,256.

946. *Id.* at 154,365. The contractor was found liable by a jury for three false claims in a *qui tam* lawsuit brought under the False Claims Act in the district court in the Western District of Oklahoma. On appeal, the Tenth Circuit affirmed. *See* AAA Engineering and Drafting, Inc., 213 F.3d 519 (10th Cir. 2000).

947. *Id.* at 154,366. Under 41 U.S.C. § 605(a) (2000), an agency head is not authorized to "settle, compromise, pay, or otherwise adjust any claim involving fraud."

948. *Id.* at 154,366 (citing Anlagen-und Sanierungstechnik, GmbH, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,753).

949. *Id.* at 154,367.

system will be implemented through a partnership with CourtLink Corp. (CourtLink). Attorneys are required to have an "E-File Subscriber Agreement" on file with CourtLink to use the system. The D.C. Superior Court, the GAO, and the COFC are also experimenting with e-filings. The advantages are time and cost savings.[950] It is just a matter of when, not if, the BCA nearest you jumps on the e-filing bandwagon.

SPECIAL TOPICS

Alternative Dispute Resolution

ADR—Not Just an "Alternative" Anymore?

Almost two years ago, the Air Force began some systematic changes designed to increase the use of alternative dispute resolution (ADR) procedures as the preferred method for resolving contract disputes.[951] Building on the success she saw in the use of ADR, Mrs. Darleen Druyen, Principal Deputy Assistant Secretary of the Air Force (Acquisition and Management), expanded the role of ADR through seven new proposals.[952] One of these proposals, to include timely identification and resolution of items in controversy in contractor past performance evaluations, drew some resistance from the National Defense Industrial Association (NDIA). The NDIA argues that considering ADR participation as a past performance evaluation factor may not be legally enforceable because it is "unnecessarily coercive and perhaps counterproductive."[953]

In a less controversial step intended to increase the use of ADR, the DLA issued a final rule that establishes ADR as the initial dispute resolution method under DLA contracts.[954] The rule adds a new solicitation provision which states that parties will agree to negotiate to resolve disputes that arise under the contract, and if unassisted negotiation is unsuccessful, the parties will use ADR techniques to attempt to resolve the issue.[955] Further, the provision requires the parties to discuss use of ADR before either party determines that ADR is inappropriate. Documentation rejecting ADR must be signed by an official authorized to bind the contractor, or by the contracting officer (if the government is rejecting ADR), and must be approved at a level above the contracting officer after consulting with the ADR specialist and legal counsel.[956] The provision does allow the offeror to opt out of the clause, but there is no guidance on how the DLA will evaluate an offeror's decision to opt out of the clause.

The COFC also announced a new pilot ADR program.[957] Under the court's new program, all cases (with the exception of bid protest cases) assigned to Chief Judge Baskir, Judge Nancy Firestone, Judge Bohdan Futey, or Judge James Turner will be simultaneously assigned to one of four ADR judges.[958] For each case in the pilot program, the COFC will issue an order requiring early neutral evaluation after the parties file their joint preliminary status report, and again at the end of discovery. The goal of the pilot program is to explore whether early neutral evaluation by a settlement judge will help effect settlement. Additionally, parties may ask the trial judge to allow ADR whenever the parties believe it will be beneficial. All information and documents submitted to an ADR judge will be kept confidential and will not be included in the official court file, nor disclosed to anyone not participating in the ADR process.[959]

Binding Arbitration at FAA

The DOJ concurred with the FAA's Office of Dispute Resolution for Acquisition (ODRA) plan to allow parties to use binding arbitration in bid protests and contract disputes.[960] The

950. *D.C. Contract Appeals Board to Allow E-Filings of Pleadings, Post Decisions on Web*, BNA FED. CONT. REP. (Sept. 18, 2001).

951. Joe Diamond, Air Force program executive officer for weapons, Remarks to the Air Force Alternative Dispute Resolution Conference, San Antonio, Texas (Apr. 17, 2001) (transcript on file with author).

952. *Id.* The seven initiatives are: (1) amending past performance guidance to include tracking the timely identification and resolution of issues in controversy, (2) requiring program managers to identify and report on issues pending more than twelve months to determine if ADR can speed up the resolution, (3) creating a pilot program for funding settlements less than $10 million, (4) increasing access to the judgment fund and flexibility in reimbursement of the fund, (5) challenging industry to develop joint training in negotiation skills and ADR, (6) establishing a recognition program for ADR excellence, and (7) promoting more uniform use of ADR within the DOD. *Id.*

953. *See NDIA Weighs in Against Air Force's Plan to Use ADR Participation in Past Performance Evaluations*, 43 GOV'T CONTRACTOR 21, ¶ 224(d) (June 6, 2001).

954. DLA Acquisition Directive: Alternative Dispute Resolution, 66 Fed. Reg. 27,474 (May 17, 2001).

955. *Id*. (adding provision 5452.233-9001 to the DLA FAR Supplement).

956. *Id.*

957. *See COFC Kicks Off ADR Pilot Program*, 43 GOV'T CONTRACTOR 14, ¶ 149 (Apr. 11, 2001).

958. The ADR judges are Senior Judge Thomas Lydon, Senior Judge Wilkes Robinson, Senior Judge Moody Tidwell, and Judge Christine Miller. United States Court of Federal Claims, *Notice of ADR Pilot Program*, *available at* http://www.contracts.ogc.doc.gov/fedcl/docs/adr.html (last visited Oct. 12, 2001).

959. *Id.*